

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ACC Licensee, Inc.)	
)	MB Docket No. 12-5
v.)	
)	CSR-8575-C
Shentel Telecommunications Company)	
)	
Emergency Petition for Finding of Bad Faith)	
Retransmission Consent Negotiations and for)	
Enforcement of Customer Notice Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: July 6, 2012

Released: July 6, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. On January 5, 2012, ACC Licensee, Inc. (“Allbritton”) filed, pursuant to Sections 1.41 and 76.7 of the Commission’s rules,¹ an Emergency Petition for Finding of Bad Faith Retransmission Consent Negotiations and for Enforcement of Customer Notice Rules (“Petition”) against Shentel Telecommunications Company (“Shentel”).² Allbritton alleges that Shentel violated its duty to negotiate retransmission consent in good faith for carriage of WJLA-TV (“WJLA”), the in-market ABC affiliate.³ Allbritton requests that the Commission issue an order requiring Shentel to agree to carry WJLA on terms that Shentel previously proposed, and that the Commission commence an enforcement action against Shentel for its violations of the good faith negotiation requirement and the notice provisions.⁴ Shentel filed an Opposition and Allbritton filed a Reply.⁵ Shentel argues that its proposal had been rejected by Allbritton’s subsequent counter-offers, and thus was no longer available when Allbritton attempted to

¹ 47 C.F.R. §§ 1.41, 76.7.

² Although the Petition names Shentel Telecommunications Company, Shentel states that the cable operator of the Shenandoah County cable system is Shenandoah Cable Television Company. *See* Shenandoah Cable Television Company, Opposition to Emergency Petition, MB Docket No. 12-5, CSR-8575-C, at 1 n. 1 (filed Jan. 9, 2012) (“Opposition”).

³ Petition at 1, 6-8.

⁴ *Id.* at 2.

⁵ Opposition; ACC Licensee, Inc., Reply to Opposition, MB Docket No. 12-5, CSR-8575-C (filed Jan. 17, 2012) (“Reply”).

accept it, and that the alleged notice violations are not germane to a determination of good faith negotiations.⁶ For the reasons set forth below, we deny Allbritton's Petition.

II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act of 1934, as amended (the "Act"), obligates broadcasters and multichannel video programming distributors ("MVPDs") to negotiate retransmission consent in good faith.⁷ Specifically, Section 325(b)(3)(C)(iii) of the Act directs the Commission to establish regulations that:

prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.⁸

3. In its *Good Faith Order*, the Commission adopted rules implementing the good faith negotiation provisions and the complaint procedures for alleged rule violations.⁹ The *Good Faith Order* adopted a two-part test for good faith.¹⁰ The first part of the test consists of a brief, objective list of negotiation standards which, if violated, constitute a *per se* breach of the duty to negotiate in good faith.¹¹ The second part of the test considers the totality of the circumstances. Under this standard, a broadcast television station or MVPD may present facts to the Commission which could, even though they do not

⁶ Opposition at ii.

⁷ 47 U.S.C. § 325(b)(3)(C).

⁸ 47 U.S.C. § 325(b)(3)(C)(iii). The good faith negotiation requirement originally was imposed only on television broadcast stations, but a reciprocal obligation was imposed on MVPDs pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004. See *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005) ("*Reciprocal Bargaining Order*").

⁹ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), recon. granted in part, 16 FCC Rcd 15599 (2001).

¹⁰ *Good Faith Order*, 15 FCC Rcd at 5457, ¶ 30.

¹¹ *Id.* at 5462-64, ¶¶ 40-46. First, a broadcast television station or MVPD ("Negotiating Entity") may not refuse to negotiate retransmission consent. Second, a Negotiating Entity must appoint a negotiating representative with authority to make binding representations on retransmission consent issues. Third, a Negotiating Entity must agree to meet at reasonable times and locations to negotiate retransmission consent and cannot act in a manner that would unreasonably delay the course of negotiations. Fourth, a Negotiating Entity may not put forth a single, unilateral proposal. Fifth, a Negotiating Entity may not fail to respond to the other party's retransmission consent proposal, and must provide the reasons for rejecting any such proposal. Sixth, a Negotiating Entity is prohibited from executing an agreement with any party requiring the Negotiating Entity not to enter into a retransmission consent agreement with any other television broadcast station or MVPD. Finally, a Negotiating Entity must agree to execute a written retransmission consent agreement that sets forth the full understanding of the broadcaster and the MVPD. *Id.*; 47 C.F.R. § 76.65(b)(1)(i)-(vii).

allege a violation of the objective standards, constitute a failure to negotiate in good faith.¹² A television broadcast station or MVPD believing itself aggrieved under the good faith rules may file a complaint pursuant to Section 76.7 of the Commission's rules.¹³ The burden of proof in good faith complaints is on the complainant.¹⁴

4. If a cable operator deletes the signal of a broadcast television station, certain notice requirements apply. Specifically, Section 614(b)(9) of the Act requires a cable operator to notify a local commercial television station in writing at least 30 days before either deleting or repositioning that station.¹⁵ This requirement is implemented in Section 76.1601 of the Commission's rules, which states that a cable operator must "provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system."¹⁶

5. Allbritton elected retransmission consent for WJLA for the 2012-2014 must carry/retransmission consent election cycle.¹⁷ Allbritton asserts that Shentel proposed retransmission consent terms for WJLA and, when Allbritton accepted those terms, Shentel withdrew the offer, dropped WJLA with insufficient notice, and refused Allbritton's attempts at further negotiation.¹⁸ Shentel responds that Allbritton rejected Shentel's offer by making a counter-offer, and thus Shentel's offer was no longer available when Allbritton belatedly attempted to accept it.¹⁹

6. Shentel also carries an out-of-market ABC affiliate, WHSV-TV, Harrisonburg, Virginia ("WHSV"), which is "significantly viewed" in Shenandoah County, and which it carried prior to its dispute with Allbritton regarding WJLA.²⁰ Shentel explains that WJLA's city of license (Washington, DC) is more than 80 miles from Shentel's Shenandoah County headend, whereas WHSV's city of license (Harrisonburg, VA) is only approximately 30 miles away, and WHSV's local news places more emphasis on Shenandoah County.²¹

7. At or around 11:59 p.m. on December 31, 2011, Shentel dropped WJLA's signal, and replaced it with a "slide" instructing viewers seeking ABC programming to tune to WHSV instead.²²

¹² *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32; 47 C.F.R. § 76.65(b)(2).

¹³ 47 C.F.R. §§ 76.65(c), 76.7.

¹⁴ 47 C.F.R. § 76.65(d).

¹⁵ 47 U.S.C. § 534(b)(9).

¹⁶ 47 C.F.R. § 76.1601. Sections 76.1602 and 76.1603 of the Commission's rules contain additional requirements for notifying subscribers and cable franchise authorities. 47 C.F.R. §§ 76.1602, 76.1603.

¹⁷ Petition at 2 and Ex. 1 at Attach. 1.

¹⁸ *Id.* at 1.

¹⁹ Opposition at 3.

²⁰ Petition at 2, n. 4; Opposition at 8. Significantly viewed ("SV") stations are television broadcast stations that are not located in the cable system's designated market area, but that the Commission has determined have sufficient over-the-air viewing to be considered local for certain purposes. See *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, 25 FCC Rcd 16383, 16385, ¶ 2 (2010).

²¹ Opposition at 10-11, n. 29.

²² Petition at 6.

According to Allbritton, Shentel “has deprived more than 8,000 Northern Virginia cable customers of long relied-upon service” from WJLA.²³ Shentel maintains that its decision to cease carrying WJLA was based on business considerations, including that Allbritton sought a 500 percent increase in retransmission consent fees, and that Shentel did not receive any customer complaints regarding inadequate notice of the deletion of WJLA from its programming service.²⁴

III. DISCUSSION

8. For the reasons set forth below, we deny Allbritton’s Petition. At the outset, we note that the parties’ inability to reach a retransmission consent agreement was due to their failure to agree on price – a fact acknowledged by Albritton.²⁵ The record reflects that the parties actively engaged in negotiations, but ultimately did not come to an agreement regarding the rate for retransmission consent of WJLA.²⁶ As we have stated previously, absent other factors, disagreement over the rates, terms, and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith.²⁷ Allbritton’s allegations are discussed below.

A. Good Faith Negotiations

9. The parties agree that Shentel made an offer regarding the terms of retransmission consent on November 10, 2011, and restated that offer on December 6, 2011.²⁸ However, they disagree about whether Shentel’s offer was still available when Allbritton attempted to accept it on December 19, 2011, and they disagree about whether Shentel’s conduct in the negotiations constituted bad faith.²⁹ Their differing views are explained below.

10. Allbritton claims that Shentel violated the *per se* good faith negotiation requirements by rejecting Allbritton’s acceptance of Shentel’s offer and failing to make a reasonable counteroffer after December 22, 2011, in violation of Section 76.65(b)(1)(i) of the Commission’s rules.³⁰ Section 76.65(b)(1)(i) prohibits a Negotiating Entity from refusing to negotiate for retransmission consent.³¹ According to Allbritton, Shentel “refus[ed] to take ‘yes’ for an answer” and “[strung] Allbritton along through sham negotiations while it concluded negotiations with WHSV.”³²

²³ *Id.* at 1.

²⁴ Opposition at 13.

²⁵ Petition at 2-3 (“[T]his per-subscriber rate quickly became the focus of negotiations and the only apparent impediment to reaching a deal.”).

²⁶ *See id.* at 3.

²⁷ *See Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, 50, ¶ 6 (MB, Jan. 4, 2007).

²⁸ Petition at 3; Opposition at 2.

²⁹ Petition at 3; Opposition at 2.

³⁰ Petition at 6.

³¹ 47 C.F.R. § 76.65(b)(1)(i).

³² Petition at 6-7.

11. Allbritton claims that “Shentel’s decision to renege on its own proposal” is also bad faith under the totality of the circumstances test.³³ According to Allbritton, Shentel made an offer on November 10 but reneged on the offer when Allbritton later accepted it, and Shentel also refused to make a counteroffer to Allbritton’s attempted acceptance of that offer.³⁴ Allbritton argues that, although Shentel stated on December 20 that it intended to drop WJLA’s signal, it did not withdraw its November 10 offer, and, on December 21, Shentel invited Allbritton to make a counteroffer.³⁵ Additionally, Allbritton states that a Shentel employee had told Allbritton as part of a negotiation for a separate station that it was not paying per-subscriber rates for out-of-market stations, but later Shentel justified its refusal to conclude a deal with Allbritton on the fact that it was paying per-subscriber rates for out-of-market WHSV.³⁶ Allbritton claims “that Shentel misrepresented its intention to carry both” WJLA and WHSV, and that it “affirmatively misled WJLA about its intention not to pay for carriage of WHSV.”³⁷

12. Shentel responds that “there was no Shentel offer outstanding when [Allbritton] belatedly attempted to ‘accept.’”³⁸ Rather, Shentel made an offer on November 10 that it restated on December 6, but counter-offers made by Allbritton between December 6 and December 19 terminated Shentel’s November 10 offer as a matter of law.³⁹ Shentel explains that “[i]t is well established that a counter-offer that does not mirror the offer itself constitutes a rejection of the original offer, and the party making the counter-offer gives up any right to accept the original offer thereafter.”⁴⁰ In addition, according to Shentel, it formally notified Allbritton that it was terminating negotiations two days before Allbritton attempted to accept Shentel’s November 10 offer.⁴¹ It argues that subsequently agreeing to entertain additional negotiations did not revive the terminated November 10 offer.⁴² After the December 20 notification of termination, Shentel states, it was not obligated to engage in any additional negotiations.⁴³

13. Shentel provides business reasons for requesting a lower fee for carriage of WJLA. Specifically, Shentel states that WHSV was available as an alternative ABC affiliate, and Shentel faced high costs in transporting WJLA’s remote off-air signal to Shentel’s Shenandoah County cable system.⁴⁴

³³ *Id.* at 7; *see also* 47 C.F.R. § 76.65(b)(2).

³⁴ Petition at 7.

³⁵ *Id.* at 7, n. 18.

³⁶ *Id.* at 7; Reply at 9.

³⁷ Reply at 8.

³⁸ Opposition at ii, 2.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 3 (footnote omitted); *see also id.* (“Indeed, the risk that the offeror might respond negatively to a counter-offer is a key component for moving negotiations forward efficiently.”). Allbritton argues that it is the Act, and not the common law of contracts, that governs allegations of bad faith in retransmission consent negotiations. Reply at 2-5. As explained in paragraph 14, *infra*, even without regard to the contract law precedent referenced by Shentel, we find as a matter of policy that it would not make sense to require all retransmission consent offers to remain available indefinitely. Such a policy would hinder retransmission consent negotiations by reducing parties’ incentive to accept offers on the table.

⁴¹ Opposition at ii.

⁴² *Id.* at 5.

⁴³ *Id.* at 5, n. 9.

⁴⁴ *Id.* at 7.

Shentel demonstrates that in October 2011 it raised with Allbritton's representative the possibility that it might be forced to carry a single ABC affiliate due to rates, and that it might carry WHSV and not WJLA.⁴⁵ Regarding Allbritton's allegations concerning Shentel's representations in the course of a separate negotiation that it was not paying per-subscriber rates for out-of-market stations, Shentel states that Allbritton could have asked Shentel how the representations applied to the WJLA negotiation.⁴⁶

14. We find that Allbritton has failed to meet its burden of proving that Shentel did not negotiate retransmission consent in good faith, under either the *per se* test or the totality of the circumstances test. Although Allbritton may regret that it did not accept Shentel's November 10 offer when it was available, that does not mean that Shentel failed to negotiate retransmission consent in good faith. Based on the account of what transpired between the parties, once Allbritton made a counteroffer to the offer that Shentel put forth on November 10 and reiterated on December 6, Shentel was no longer bound to its November 10 offer.⁴⁷ Allbritton has failed to provide any valid basis for disregarding black letter contract law that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer,"⁴⁸ and Shentel cites case law supporting this proposition.⁴⁹ Our retransmission consent rules set out a framework for ensuring that parties negotiate in good faith but do not, as a general matter, supplant basic principles of contract law.⁵⁰ Moreover, as a policy matter, it would make little sense to require every offer made in the context of a retransmission consent negotiation to run in perpetuity. As Shentel states, "parties to retransmission consent negotiations [would] never feel compelled to accept an existing offer, because they [would] know that, if their attempts to secure a better deal fail, they [could] always go to the Commission and insist that the other party must honor the prior offer."⁵¹ It appears that Shentel made a reasonable business decision to "minimize[e] costly retransmission consent fees,"⁵² given that its customers have access to ABC programming through WHSV. Shentel's willingness to listen to subsequent Allbritton proposals did not change the fact that Shentel's November 10 offer was no longer available.⁵³ We are not persuaded that Allbritton was misled by the alleged representations of a Shentel

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 6-7, n. 15.

⁴⁷ *Id.* at 3.

⁴⁸ *Restatement (Second) of Contracts* § 39 (1979) ("An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.").

⁴⁹ See *Virginia Hardwood Lumber Co. v. Hughes*, 140 Va. 249, 124 S.E. 283, 286 (Va. 1924) ("If an offer is rejected either by absolute refusal . . . or by counter proposal, the party making the original offer is relieved from liability on that offer, and the party who has rejected the offer cannot afterwards, at his own option, convert the same offer into an agreement by a subsequent acceptance."). See also *Bank of Southside Virginia v. Host & Cook, LLC*, 239 F.R.D. 441, 447 (E.D. Va. 2007) ("under black-letter contract law adopted by the Supreme Court of Virginia, an offeree who rejects an offer loses the power later to accept that offer").

⁵⁰ See *Good Faith Order*, 15 FCC Rcd at 5453, ¶ 20 ("[T]he Court has stated that, when a statutory provision does derogate from the common law, it 'must be strictly construed for no statute is to be construed as altering the common law, farther [sic] than its words import.'") (quoting *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959), and citing E. Allen Farnsworth, *Contracts* § 3.26 (2d ed. 1990) (requirement to negotiate in good faith is a departure from common law principles protecting the freedom of contract)).

⁵¹ Opposition at ii.

⁵² *Id.*

⁵³ See n.48, *supra*; see also Opposition at 5.

employee that Shentel was not paying per-subscriber rates for out-of-market stations. Rather, the record demonstrates that the Shentel employee was not involved in the WJLA negotiations, and Allbritton could have asked Shentel how those representations applied to the WJLA negotiations. Further, Shentel told Allbritton in October 2011 that whether it could carry both WHSV and WJLA would depend on each broadcaster's rate.

15. We conclude that Shentel did not violate the good faith negotiation requirements. At its core, this dispute involves a fundamental disagreement between the parties over the appropriate valuation of WJLA's signal to Shentel. Such a disagreement without more is not indicative of a lack of good faith.⁵⁴ Even with good faith, impasse is possible.⁵⁵ As the Commission stated in the *Reciprocal Bargaining Order*:

MVPDs and broadcasters alike will not be required to engage in an unending procession of extended negotiations. . . . [P]rovided that a party to a [good faith] negotiation complies with the requirements of the Commission's rules, failure to reach agreement would not violate either Section 325(b)(3)(C) or Section 76.65 of the Commission's rules.⁵⁶

B. Notice Requirements

16. Allbritton states that Shentel also provided insufficient notice to both Allbritton and Shentel's customers of its decision to drop WJLA.⁵⁷ Although Shentel was required to provide at least 30 days written notice to Allbritton before it deleted WJLA's signal, Allbritton argues that Shentel provided only 11 days notice to Allbritton via email.⁵⁸ Allbritton states that Shentel also presumably failed to provide the required notice to its own subscribers.⁵⁹ Allbritton states that the notice requirements are "an important part of cable operators' responsibility to deal with all interested stakeholders in good faith."⁶⁰

17. Shentel responds that the alleged notice violations are irrelevant to a determination of whether Shentel negotiated with Allbritton in good faith.⁶¹ Shentel states that it "will voluntarily refund its entire basic service charge for the period following WJLA's deletion to any customer who terminate[d] service during the month of January and advises Shentel that the termination was due to WJLA's deletion."⁶² Additionally, Shentel explains that the potential deletion of carriage was referenced in an

⁵⁴ See, e.g., *Mediacom v. Sinclair*, 22 FCC Rcd at 57, ¶ 24.

⁵⁵ See, e.g., *id.*

⁵⁶ *Reciprocal Bargaining Order*, 20 FCC Rcd at 10345, ¶ 14.

⁵⁷ Petition at 8-9; see also 47 C.F.R. §§ 76.1601, 76.1603.

⁵⁸ Petition at 9.

⁵⁹ *Id.*

⁶⁰ Reply at 12.

⁶¹ Opposition at ii.

⁶² *Id.* at iii, 12-13.

article in *The Northern Virginia Daily* on December 8, and Shentel ran advertisements in that newspaper on three separate occasions before deleting WJLA.⁶³

18. We decline to address the alleged notice violations as part of this proceeding. We agree with Shentel that violations of our notice rules are a separate issue from violations of our good faith negotiation rules. Nonetheless, we caution Shentel that the Commission has stated that, if a station is deleted following the expiration of a retransmission consent agreement and the cable operator has not given the required 30 day notice, then the cable operator is in violation of the Commission's rules.⁶⁴ The Commission has stated further that, notwithstanding the fact that it may not have enforced the notice requirements in all instances in which a station is deleted without notice, it reserves the right to do so in its discretion.⁶⁵

IV. CONCLUSION

19. For the reasons set forth above, we deny Allbritton's Petition.

V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that ACC Licensee, Inc.'s Emergency Petition for Finding of Bad Faith Retransmission Consent Negotiations and for Enforcement of Customer Notice Rules against Shentel Telecommunications Company, filed pursuant to Sections 1.41 and 76.7 of the Commission's rules, **IS DENIED**.⁶⁶

21. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.⁶⁷

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

⁶³ *Id.* at 12 and Ex. C.

⁶⁴ *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2737, ¶ 35 (2011).

⁶⁵ *Id.* at 2737, n. 105.

⁶⁶ 47 C.F.R. §§ 1.41, 76.7.

⁶⁷ 47 C.F.R. § 0.283.